IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1166

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,
on its own behalf and on behalf of its members,
DAVID W. JAMES,
KENNETH WHITMAN,

Appellants,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017
Attorneys for Appellants

Of Counsel:

H. PETER YOUNG
1725 The Promenade, No. 516
Santa Monica, California 90401

MICHAEL L. HERTZBERG
275 Madison Avenue
New York, New York 10016

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The appellants, the Church of Scientology of California, David W. James and Kenneth Whitman, appeal from the judgment of the United States District Court for the Central District of California, entered on October 13, 1978, denying their motion for a preliminary injunction and dismissing the underlying action.[1] This statement is sub-

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[1] Since the commencement of the action, W. Michael Blumenthal has replaced William Simon as Secretary of the Treasury, and he is here substituted as appellee in place of Mr. Simon. See U.S. Sup. Ct. R.48(3); Fed. R.Civ.P. 25(d). The other appellees, listed here because of their number, are: Vernon D. Acree, Commis-

mitted to show that the Court has jurisdiction over the appeal and that substantial questions are presented.

Opinion Below

The opinion of the district court (App. A, pp. 1a-11a) is not yet reported.

Jurisdiction

This is an appeal from a judgment of a three-judge district court which was convened under former 28 U.S.C. §§ 2282, 2284[2] to consider the constitutionality of 19 U.S.C. § 1305 and other constitutional issues raised by appellees' conduct. The district court's judgment (Appendix B) was entered on October 13, 1978. A notice of appeal (Appendix C) was filed in the district court on November 8, 1978. On December 27, 1978, Mr. Justice Rehnquist extended the time within which to file a Jurisdictional Statement and docket the appeal to and including January 26, 1979. The Court has jurisdiction to hear a direct appeal from the judgment under 28 U.S.C. § 1253.

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sioner of Customs; George C. Corcoran, Jr., Assistant Commissioner of Customs Investigations; Albert Bergerson, Regional Commissioner of Customs; Robert S. Baker, Regional Director of Investigations, United States Customs Service; John Brady, District Director of the United States Customs Service; Kenneth Ascheim, Agent in Charge of Los Angeles District Office of Investigations, United States Customs Service; Michael Peel, Special Agent, United States Customs Service; Larry Hoyle, Inspector, United States Customs Service.

[2] Sections 2282 and 2284 were repealed by the Act of August 12, 1976, Public Law 94-381, 90 Stat. 1119, but the repealing law does not apply to actions commenced before the date of its enactment. The complaint was filed on July 7, 1976.

Questions Presented

1. Whether the First and Fourth Amendments prohibit customs inspectors from reading papers and correspondence sent to the United States without obtaining a warrant upon probable cause to believe that importation of the documents would violate United States customs laws?

2. Whether the First and Fourth Amendments and 19 U.S.C. § 482 prohibit customs inspectors from reading papers and correspondence sent to the United States absent reasonable cause to suspect that importation of the documents would violate United States customs laws?

3. Whether the detention and general search of correspondence by customs agents for evidence of *any* crimes may be deemed a "border search" exempt from the Fourth Amendment requirement of a warrant issued upon probable cause?

4. Whether 19 U.S.C. § 1305 is unconstitutional for prohibiting the importation of written material merely "advocating or urging treason or forcible resistance to any law of the United States," without requiring that the proscribed written advocacy be directed to inciting or producing imminent lawless action and be likely to incite or produce such action?

5. Whether 19 U.S.C. § 1305 is unconstitutional in imposing a prior restraint upon non-obscene written advocacy without prior judicial approval and without a subsequent immediate judicial determination that the advocacy is not constitutionally protected?

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. §482 provides in relevant part:

> SEARCH OF VEHICLES AND PERSONS
>
> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; . . .

19 U.S.C. §1305 provides in relevant part:

> IMMORAL ARTICLES: PROHIBITION OF IMPORTATION
>
> (a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; . . .

Statement of the Case

On July 3, 1976, two shipments of three cardboard boxes sent by air cargo from the Worldwide Church of Scientology in England to the Church of Scientology of California ("the Church") arrived at the British Airways office at Los Angeles International Airport. Michael Moore, a member of the Church went to the airport that evening to obtain the packages.

The packages were accurately marked as containing documents of no commercial value (Moore Aff., p. 2).[3] They each were filled with sealed envelopes of correspondence, both personal and Church-related, and internal Church memoranda, directives, financial data, legal correspondence, religious communications, articles for Church publications and information concerning the religious beliefs and activities of individual Church members (*id.*, p. 1).

On July 3, Larry Hoyle, a Customs Inspector at the Los Angeles International Airport, was requested to clear the three boxes for entry into the United States (Hoyle Aff., p. 2).[4] Hoyle stated in a later hearing that in accordance with "normal customs policy", he ordered Moore to open the boxes and "most" of the envelopes contained therein (Hoyle Tr. 42, 43).[5] Hoyle then removed documents from the envelopes and began to read them (Hoyle Tr. 43); he gave no reason for that unauthorized reading. He stated that his reading disclosed "references to the CIA, Interpol, debugging, decoding machine, sabotage and other matters . . ." which made him "[dis]satisfied with what [he] saw" (Hoyle Tr. 43, 44; Hoyle Aff., p. 5).[6] Hoyle and his supervisor decided that the documents should be detained and examined by a Customs Special Agent (Hoyle Aff., p. 2).

[3] The notation "Moore Aff." refers to an affidavit of Michael Moore dated July 8, 1976. This and other documents referred to remain part of the record before the district court. Copies will be lodged with the Court upon request.

[4] The notation "Hoyle Aff." refers to an affidavit of Larry Hoyle, dated July 14, 1976.

[5] The letters "Tr." refer to pages in the transcript of a hearing held before Judge Gray in this case on August 31, 1976.

[6] Moore stated that Hoyle told him: "I don't like this. I'm not going to release the shipment. I'm going to hold it" (Moore Aff. p. 3).

On July 4, 1976, Customs Special Agent Michael Peel "briefly reviewed the materials contained in the three boxes and concluded that they should be detained for further screening" (Peel Aff., p. 2).[7] He "transported the three boxes to Terminal Island, California, for further review and for safekeeping" (Peel Aff., p. 2).

During the next three days Peel read and re-read every document in the boxes[8] (Peel Tr. 55, 84) in a search for evidence of violations of 19 U.S.C. § 1305 or "other violations of the law" and "evidence of crime" (Peel Tr. 53, 54). He stated that he felt no need to obtain a warrant in order to read the documents (Peel Tr. 90-91).

Upon reviewing "all the documents" Peel concluded that none could be imported for reasons other than possible violation of 19 U.S.C. § 1305, *i.e.*, because they "were documents of an intelligence organization that were evidence of crimes of both Internal Revenue Service tax fraud laws, possibly violations of the statutes enforced by the Federal Bureau of Investigation and other agencies" (Peel Tr. 60-61).

Additionally, four other customs officials reviewed the private documents of the Church and its members (Peel Tr. 59-61). Peel also consulted with several Assistant United States Attorneys (Peel Tr. 41). On July 7, 1976, the Bureau of Customs determined that the correspondence and other documents were outside the purview of 19 U.S.C. § 1305 and must be returned to the Church (Tr. 96-97).

[7] The notation "Peel Aff." refers to an affidavit of Michael Peel, dated July 15, 1976.

[8] A fourth box containing a mixture of full and empty envelopes was found on the loading dock of British Airways on July 5, 1976, and delivered to Peel on the following day. He placed it with the three other boxes he already had seized.

On the same day, appellants brought this action seeking the convening of a three-judge court to review the constitutionality of 19 U.S.C. §1305, and for declaratory and injunctive relief and damages. Appellants alleged that section 1305 was unconstitutional on its face and as applied because, *inter alia,* (1) it proscribed the importation of written material abstractly advocating treason or insurrection against the United States, contrary to the standards of *Yates* v. *United States,* 354 U.S. 298, and *Brandenburg* v. *Ohio,* 395 U.S. 444; and (2) it imposed a prior restraint upon the importation of non-obscene written advocacy without prior judicial review embodied in a warrant or an immediate judicial hearing. Appellants argued that since section 1305 supplied the only colorable statutory authority for barring the importation of written material into the United States, the search and seizure of the documents was unlawful.

Appellants also urged that the search and seizure of their papers and private correspondence were unlawful under the First and Fourth Amendments and 19 U.S.C. §482 because the customs agents had not obtained a warrant for the search of the documents and did not have probable cause to believe or even reasonable grounds to suspect that importation of the papers would violate United States customs laws. Appellants sought an order enjoining enforcement of section 1305, prohibiting the government from further copying or dissemination of the seized papers, and requiring the government to return to them all copies of the papers.

On July 9, 1976, District Judge William P. Gray issued a temporary restraining order prohibiting the appellees from making and disseminating copies or notes of the materials in the four boxes. Appellees were permitted, however, to disclose the contents of the boxes to the United States At-

torney for the Central District of California, who could make a single copy of "such material as he finds appropriate for criminal evidentiary purposes or for defense against any damage claims." [9]

Following an evidentiary hearing Judge Gray continued his restriction against further government dissemination of the retained materials or information derived from any of the materials in the four boxes (Hearing of August 31, 1976, pp. 113-166). The judge also certified constitutional questions arising from the government's actions under 19 U.S.C. §1305 to a three-judge court (*id.* at pp. 116-118).

On April 24, 1978, a three-judge court was convened pursuant to 28 U.S.C. §2281, comprised of Circuit Judge Stanley N. Barnes and District Judges Gray and Warren J. Ferguson. In an opinion dated October 13, 1978, the court rejected all of the appellants' claims and dismissed the action. While acknowledging that section 1305 on its face proscribed "mere advocacy" of unlawful actions, the district court construed the section as prohibiting the importation only of written advocacy intended or likely to incite imminent lawless action, thus incorporating the standard of *Brandenburg* v. *Ohio, supra* (App. A at 4a). The court also rejected the claim that § 1305 permitted an unconstitutional prior restraint of non-obscene First Amendment expression, holding that the "very short" delay in the instant case had not amounted to a constitutional deprivation (*Id.* at 5a).

Turning to the actual searches, the court held that Agent Hoyle's initial opening of the packages and envelopes and reading of the documents were lawful on the ground that a border search of papers and private cor-

[9] On the same day, Agent Peel made one copy of certain materials in the boxes and delivered them to Assistant United States Attorney Dooley (Peel Tr. 58, 59; Peel Aff., p. 3).

respondence is reasonable *per se* even without reasonable cause to believe that the documents are not importable (*id.*, 6a). It upheld the subsequent "more intrusive" reading of the documents at Terminal Island as a legitimate border search predicated upon a "real suspicion" arising from the initial search (*id.*, 7a). It also observed that the correspondence reviewed at Terminal Island was in "plain view," as a result of the initial search and seizure at the airport (*id.*, 8a).

The Questions Are Substantial

I

This is the first case ever presented to this Court in which United States customs employees, pursuant to a purported border search, have detained and read papers and private correspondence without obtaining a warrant and without having even reasonable cause to suspect that importation of the papers would violate United States customs laws. While this Court and the lower federal courts long have justified warrantless border searches for physical contraband on less than probable cause, they always have emphasized that such searches "are totally different things from a search for and seizure of a man's private books and papers," *Boyd* v. *United States,* 116 U.S. 616, 623; *Murgia* v. *United States,* 285 F.2d 14, 17 (9th Cir. 1967), *cert. denied,* 366 U.S. 977, and that "there is no substantial likelihood that [such] . . . searches will chill the exercise of First Amendment rights." *Zweibon* v. *Mitchell,* 516 F.2d 594, 631-32 n.93 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 425 U.S. 944.

The decision of the district court below obliterated any legal distinction between border searches for physical contraband and the reading of private papers by customs

employees. If allowed to stand, the decision will signal that all written matter brought into the United States by any means other than by international mail[10] will be subject to reading and detention by the United States Customs Service for any reason at all, or for no reason. The chilling effect on the exercise of First Amendment rights of speech and expression would be monumental.

This case thus presents the novel and substantial question of what constitutional standards govern the authority of United States customs inspectors to read papers and private correspondence sent or brought to this country. In particular, the Court must decide whether a customs officer is free to read such papers not only without obtaining a warrant upon a showing of probable cause to believe that their importation would violate United States customs laws, but even without the reasonable cause to suspect such a potential violation of law mandated by 19 U.S.C. § 482.

The question was explicitly reserved with obvious concern in *United States* v. *Ramsey,* 431 U.S. 606, which sustained the warrantless border opening of mailed envelopes in a search for narcotics.[11] The Court found statutory authority for the warrantless search in 19 U.S.C. §482, which authorizes inspection of envelopes when an inspector "has reasonable cause to suspect there is merchandise [therein] which was imported contrary to law," and held that the customs official in fact had met the statutory stan-

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[10] A customs regulation prohibits customs officers from reading international mail without obtaining a warrant upon probable cause. 19 C.F.R. § 145.3.

[11] Indeed, in its petition for a writ of certiorari in *Ramsey,* the government took pains to advise the court that "there has been no showing in this case that customs inspectors read or censor mail." Petition at 14.

dard.[12] The Court noted that the reasonable cause to suspect standard of section 482 was "a practical test," which, although "less stringent" than that of probable cause, satisfied the Fourth Amendment requirement of reasonableness when applied to border searches. 431 U.S. at 612-613.

The Court emphasized that it was not dealing with a case in which customs inspectors had *read* correspondence contained in a mailed envelope or package. 431 U.S. at 618 n.8, 623-624.[13] It noted that applicable postal regulations "flatly prohibit, under all circumstances, the reading of [mailed] correspondence, absent a search warrant" (*id.* at 623). In the light of such provisions and practice, the Court concluded that customs inspections of envelopes to discover contraband, as in *Ramsey,* do not "impermissibly chill the exercise of free speech" (*id.* at 624). The Court found it "unnecessary to consider the constitutional reach of the First Amendment in this area in the absence of the existing statutory and regulatory protection", including the question of whether, in such absence, "the appropriate response would be to apply the full panoply of Fourth Amendment protections." *Id.,* n.18.[14]

The questions not reached in *Ramsey* are presented in stark and dramatic form in the instant case. Customs officials were not prohibited by a postal or other regulation

[12] The inspector spotted eight bulky envelopes apparently typed on the same typewriter, all of which had been mailed from Thailand, "a known source of narcotics." He felt one of the letters and concluded that "there was something in there." He weighed it and determined that it was three to six times the weight of a normal air mail letter. The inspector then opened the envelope and discovered narcotics.

[13] No letters or other written material were contained in the envelopes searched in *Ramsey.*

[14] Justice Powell, concurring, also specifically noted and relied upon the postal regulations and practice prohibiting the reading of correspondence. 431 U.S. at 625.

from reading the correspondence and papers contained in the packages because the parcels arrived by air cargo rather than international mail.[15] And customs officials, upon discovering the existence of the correspondence and documents when they opened the packages, immediately proceeded to read the material without the slightest basis to believe or even suspect that their importation would violate United States customs laws.

The district court, ignoring the statutory and regulatory provisions which underlay the *Ramsey* decision, ruled that the customs inspectors properly read the correspondence. It found that the mere fact that 19 U.S.C. § 1305[16] makes the importation of specified categories of written matter unlawful justified the initial search of the documents, even though there was no reason to suspect a section 1305 violation. Relying on *United States* v. *Wilmot,* 563 F.2d 1298 (9th Cir. 1977), which involved a strip search for purposes of discovering illegal drugs, the district court held that even papers may be examined initially simply because they arrive at the border from abroad and that, if, on the basis of the initial inspection, the customs officer develops a "real suspicion" that they are unimportable, they may be subjected to a thorough reading (App. A at 7a). In equating the constitutional standard applicable to border reading of correspondence with that purportedly governing

[15] As *Ramsey* repeatedly emphasized, the fact that the correspondence in this case arrived by air cargo rather than international mail is of no significance to the *constitutional* issues involved, for there is "no distinction in constitutional doctrine stemming from the mode of transportation across our borders . . ." 431 U.S. at 621.

[16] 19 U.S.C. § 1305 (*supra,* p. 5) prohibits the importation into the United States of any writing or document which is obscene or contains ". . . any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life or inflict bodily harm upon any person in the United States . . ."

searches for physical contraband,[17] the court below entirely disregarded a long line of this Court's decisions holding that warrantless searches of private communications intrude upon First as well as Fourth Amendment interests and thus must be tested against First as well as Fourth Amendment standards.

This Court has recognized that governmental intrusion into private communications may well conflict "with the 'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment." *Lamont* v. *Postmaster General,* 381 U.S. 301, 307, quoting *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270; *United States* v. *United States District Court,* 407 U.S. 297, 314. Thus, it has ruled that searches of domestic written expression for the purpose of determining whether it is unlawful and unprotected are not to be judged by the same constitutional standards as searches for physical contraband or evidence because of "the serious hazard of suppression of innocent expression." *Marcus* v. *Search Warrant,* 367 U.S. 717, 730-731; see *Roaden* v. *Kentucky,* 413 U.S. 494, 502, 503 n. 4; *Quantity of Copies of Books* v. *Kansas,* 378 U.S. 209, 211-12; *Stanford* v. *Texas,* 379 U.S. 476, 489 n. 18. Consequently, the Court has insisted that the Fourth Amendment warrant requirement must be accorded "scrupulous" and "particular exactitude" when "First Amendment interests would be endangered by the search", that is, where the papers to be searched "may be protected by the First Amendment." See *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 564 and cases there cited. Because "the values of freedom of expression" call "for a higher hurdle in the evaluation of reasonableness" under

[17] Even with respect to physical contraband, the district court ignored the clear import of *Ramsey* and 19 U.S.C. § 482 that a search for contraband may proceed only if there is "reasonable cause to suspect" a customs violation. See *post,* pp. 16-17.

the Fourth Amendment, a search directed at private, domestic expression or communications requires a warrant although none would be required if the search's object were physical contraband rather than expression. *Roaden* v. *Kentucky,* 413 U.S. 494, 504, 506.

The question here, then, is whether these First Amendment principles requiring a warrant for domestic searches of expression are diluted when the expression originates abroad and the search is conducted at the border. The First Amendment embraces the American public's right to receive information and ideas from abroad, for the plenary power to exclude aliens and physical contraband or goods does not extend to protected expression. *See Lamont* v. *Postmaster General, supra,* 381 U.S. at 307; *Kleindienst* v. *Mandel,* 408 U.S. 753, 762-65. Thus intrusions on the First Amendment freedoms resulting from a warrantless search of private papers may "only be justified by a substantial governmental interest and a showing that the means chosen to effectuate the State's purpose are not unnecessarily restrictive of personal freedoms." *See Procunier* v. *Martinez,* 416 U.S. 396, 425.

The government has not met that test here. On the one hand, the major evil which the Fourth Amendment's warrant requirement was intended to prevent is general and indiscriminate rummaging among private papers on the basis of official discretion or whim. *See, e.g., Zurcher* v. *Stanford Daily, supra,* 437 U.S. at 564; *Stanford* v. *Texas,* 379 U.S. 476, 484-85; *United States* v. *Poller,* 63 F.2d 911, 914 (2nd Cir. 1930) (L. Hand, J.). On the other, the government claims an interest under 19 U.S.C. § 1305 in preventing entry of unprotected and unlawful expression. See *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 376. But it has not shown that its alleged interest is sufficiently compelling to justify the wholesale intrusions

upon protected expression inevitably resulting from warrantless search of private papers.[19] Indeed, the government does not deem warrantless reading necessary for enforcement of Section 1305 against correspondence *mailed* from abroad, for a postal regulation prohibits customs officers from reading letters without a warrant. No reason exists in theory, practice or policy why the government's asserted interest in preventing the importation of literary "contraband" is any greater when the documents are shipped by air cargo rather than international mail.

The Court does not have to reach the question of whether the First and Fourth Amendments require a warrant based upon probable cause for border searches of private correspondence and papers. The Court need decide only that the First and Fourth Amendments, in conjunction with 19 U.S.C. § 482, prohibit the kind of random and arbitrary perusal of such documents engaged in by customs inspectors in this case. Indeed, the Court already has held in *Ramsey* that the Fourth Amendment and 19 U.S.C. § 482 limit the authority of customs officers to search even for nonliterary contraband to situations in which there is "reasonable cause to suspect" a violation of the customs law. Surely, as *Ramsey* made clear, no lesser standard is appropriate when the search involves the reading of private papers.[18]

[19] Customs officers may detain private papers for a reasonably short period to give them a chance to obtain a warrant. *United States* v. *Van Leeuwen*, 397 U.S. 249.

[18] Numerous courts of appeals and district courts have applied the "reasonable cause to suspect" test while upholding warrantless opening of sealed envelopes. See *United States* v. *King*, 517 F.2d 350 (5th Cir. 1975) (package of mail consisting of numerous card-size envelopes of unusual thickness from a small group of senders with identical overseas addresses; powdery cushion felt inside envelopes); *United States* v. *Milroy*, 538 F.2d 1033 (4th Cir. 1976) (five envelopes mailed from abroad on same day to same addresses; envelopes heavier than if they contained mere correspondence and

In the instant case there was not a scintilla of evidence upon which Customs Agent Hoyle could found a "reasonable cause to suspect" that customs laws would be violated by the importation of the sealed correspondence in question. His own uncontroverted testimony discloses no reason for his opening of the envelopes and initial reading of their contents. In fact, immediately prior to opening the envelopes, Agent Hoyle had been able visually to verify that the packages he ordered opened contained envelopes and not merchandise, consistent with the package markings. There were none of the indicia such as suspicious weight, feel, size, shape, address or markings on the envelopes which gave rise to the "reasonable cause to suspect" found in *United States* v. *Ramsey*, *supra*, and the cases cited in footnote 18. And once the packages were opened, Agent Hoyle could verify by sight that they contained only written papers. He had absolutely no basis for suspecting that the documents might themselves be contraband.

The three-judge district court erroneously failed to apply the "reasonable cause to suspect" test. It concluded that both the opening of the envelopes and the initial reading of the correspondence were reasonable simply because they occurred during a border search. This is in conflict with this Court's decision in *Ramsey* which applied a test of reasonable cause to suspect upon an indisputable border

envelopes sniffed by trained dog who identified them as bearing narcotics); *United States* v. *Doe*, 472 F.2d 982 (2d Cir. 1972) (large package from country commonly source of drugs; label aroused suspicion with experienced customs officer); *United States* v. *Swede*, 326 F.Supp. 533 (S.D.N.Y. 1971) (envelope mailed from Switzerland opened after white powder escaped); *United States* v. *Sohnen*, 298 F.Supp. 51 (E.D.N.Y. 1951) (sealed package opened and illegally imported coins discovered after unusual weight and feel of package noted and spectroscopic examination revealed that it contained 12 disc-shaped objects); *United States* v. *Head*, 416 F.Supp. 840 (S.D.N.Y. 1976) (internationally mailed package of suspected drug trafficker fluoroscoped before being opened).

search. The First and Fourth Amendments and 19 U.S.C. § 482 require at least the same showing before sealed envelopes may be opened and private papers read by a customs officer.

II

This case presents the important question of whether the detention and general search of correspondence by customs agents for evidence of *any* crimes may be deemed a "border search" exempt from the Fourth Amendment requirement of a search warrant issued upon probable cause. The border search exception, as with all exceptions to the warrant requirement, must be "jealously and carefully drawn". *Jones* v. *United States*, 357 U.S. 493. To sanction the instant wholesale warrantless reading of the appellants' correspondence during the course of a planned general search for evidence of criminal offenses would be a radical departure from judicial conceptions of what constitutes a border search.

Customs Agent Peel testified as to the purpose of his searches of the documents after they had been seized and removed to Terminal Island. One one occasion, he stated that the papers were read to determine if there was "evidence of crime" and at another juncture he declared that he was searching for evidence of violations of 19 U.S.C. § 1305 or "other violations of the law" (*supra*, p. 7). By his own testimony, Peel was engaged in a general law enforcement search for evidence of crimes and not a border search "related to the entry of contraband or dutiable merchandise into the United States." *Amador-Gonzalez* v. *United States*, 391 F.2d 308, 312 (5th Cir. 1968).

Before even formulating the "border search exception" this Court recognized the distinction between a customs search and a general law enforcement search:

> The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.

Boyd v. *United States*, 116 U.S. 616, 623.

Courts have remained sensitive to the difference between a border search and its narrow purpose and a general law enforcement search requiring a warrant:

> The Congress has in effect declared that a search which would be "unreasonable" within the meaning of the Fourth Amendment, if conducted by public officers in the ordinary case, would be a reasonable search if conducted by *customs officials in lawful pursuit of unlawful imports*. Judicial recognition of this distinction has given rise to the term "border search" in order to distinguish official searches which are reasonable because made solely in the enforcement of customs laws from *other official searches made in connection with general law enforcement*.

Alexander v. *United States*, 362 F.2d 379, 381-382 (9th Cir. 1966) (emphasis supplied).[19]

It is clear that Peel searched the "private communications" in question for general evidence of crimes, and not violations of the customs laws. The fact that he *also* was looking for violations of 19 U.S.C. § 1305 did not convert his far reaching general search into a border search. Peel

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[19] See *United States* v. *Diamond*, 471 F.2d 771, 773 (9th Cir. 1973); *Klein* v. *United States*, 471 F.2d 847, 849 (9th Cir. 1973); *Amador-Gonzalez* v. *United States*, *supra*; *United States* v. *Swede*, *supra* at 536; *United States* v. *Head*, *supra* at 843; *United States* v. *Sohnen*, *supra* at 55.

was required by the Fourth Amendment to obtain a search warrant from a neutral and detached judicial officer, just as would any other law enforcement officer prior to conducting a search of private papers. *Katz* v. *United States,* 389 U.S. 347; *Terry* v. *Ohio,* 392 U.S. 1; *United States* v. *United States District Court, supra.*

Courts repeatedly have denounced "pretext" searches conducted for the purpose of evading the warrant requirement. *Coolidge* v. *New Hampshire,* 403 U.S. 443; *Kelly* v. *United States,* 197 F.2d 162 (5th Cir. 1952); *Corngold* v. *United States,* 367 F.2d 1 (9th Cir. 1966); *Amador-Gonzalez* v. *United States,* 391 F.2d 308 (5th Cir. 1968); *Green* v. *United States,* 386 F.2d 953 (10th Cir. 1967). If the three-judge court's decision is allowed to stand, it cannot help but encourage the calculated circumvention of the warrant requirement since it implies that virtually any search conducted by members of the United States Customs Service is a "border search", irrespective of its purpose.

III

The question of whether 19 U.S.C. § 1305's proscription of the importation of writings "containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States" violates the First Amendment because it prohibits mere abstract advocacy is also novel and substantial. No court, other than the one below, has ever construed the language.[20]

[20] The Church has standing to raise this question although its papers ultimately were not seized under Section 1305, but were returned. The government has conceded that the sole basis for the reading of the Church's papers was enforcement of this portion of Section 1305. "With the statutory predicate declared unconstitutional, there [would be] no legal justification for the intrusion" into the papers. *McSurely* v. *McClellan,* 553 F.2d 1277, 1291-92 (D.C. Cir. 1976) (en banc); *cf. Powell* v. *Stone,* 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds,* 428 U.S. 465.

As the court below correctly concluded (App. A. at 3a), Section 1305 does not on its face meet the test enunciated in *Brandenburg* v. *Ohio,* 395 U.S. 444, 447-48, which held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The question, then, is whether, as the court below held (App. A at 4a), section 1305 may be construed to incorporate the *Brandenburg* standard.

The relevant principles of statutory construction are well-settled. "Although [the] Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." *Aptheker* v. *United States,* 378 U.S. 500, 515. A statute may not be saved by a narrowing construction if that construction is "inconsistent with the expressed intention of some of its authors." *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 369-70. Thus a law prohibiting advocacy may be narrowly construed to meet constitutional standards if the enacting "Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action . . . and did not intend to disregard it." *See Yates* v. *United States,* 354 U.S. 298, 319; *Dennis* v. *United States,* 341 U.S. 494, 502.

The district court completely ignored these principles and the legislative history underlying the enactment of section 1305. The Congress which added the advocacy provision

to Section 1305 in 1930 explicitly intended that it embrace abstract advocacy. The House reported that the statute was drawn "in conformity with the present provisions of the postal laws" and was intended to prohibit "books, pamphlets and other matters of a seditious or anarchistic nature." *H.R. Rep. No. 7,* 71st Cong., 1st Sess. at 160. The postal law from which section 1305 was derived (then codified as 18 U.S.C. § 344) was identical in terms to the new statute, and in fact was a verbatim recodification of Title 12, section 2 of the Espionage Act of 1917 (40 Stat. 217).[21] The latter section had been definitively construed by this Court and by the United States Court of Appeals for the Second Circuit to authorize the Postmaster General or his agents to prohibit the mailing of material merely advocating sedition, treason or violation of United States law, irrespective of the likelihood that such advocacy would incite imminent lawless action. *United States ex rel. Milwaukee Social Democrat Pub. Co.* v. *Burleson,* 255 U.S. 407; *Masses Publishing Co.* v. *Patten,* 246 F. 24 (2d Cir. 1918).[22] *See* Chafee, *Free Speech in the United States,* 42-49, 298-305 (1941). Indeed, the Court in *Burleson* upheld the Postmaster General in barring from the mails written material merely criticising laws and government policy, on the ground that such criticism *impliedly* advocated civil disobedience. 255 U.S. at 414-415; *see* Chafee, *supra* at 303. Under the aegis of the Act, the Postmaster General engaged in probably the broadest and most stringent censorship campaign in this nation's history. *See* Chafee, *supra* at 98-99 for a brief description of that effort and of the nature of the materials

[21] The statute is now codified as 18 U.S.C. § 1717.

[22] Indeed, the Second Circuit in *Masses* reversed an injunctive order issued by then-District Judge Learned Hand. Judge Hand had held that the Postmaster General could prohibit mailing only of material constituting a "direct incitement to violent resistance." 244 F. 535, 540 (S.D.N.Y. 1917).

barred from the postal system. The use of the statute to prohibit the mailing of abstract written advocacy continued at least until after enactment of the advocacy provision of 19 U.S.C. § 1305 in 1930. See *Gitlow* v. *Kiely,* 44 F.2d 227 (S.D.N.Y. 1930). This contemporaneous construction and enforcement of the very statute upon which section 1305 explicitly was modelled manifests the intent of the enacting Congress[23]

The Senate debates confirm that the 1930 Congress intended to proscribe the importation of abstract advocacy documents. The bill's supporters claimed that enactment was necessary to bar the entry of "dangerous European or foreign ideas," "socialistic and communistic literature," opposition to the American form of government, and "seditious garbage." 82 Cong. Rec. 5487-5520.

Thus it is clear that the district court did not construe section 1305 in accordance with the meaning of the enacting Congress, but rather rewrote the statute contrary to the Congress' express intent. But "it is for Congress, not the Court, to rewrite the statute". *Blount* v. *Rizzi,* 400 U.S. 410, 419. The decision of the district court on the substantial federal question of statutory construction and constitutional law must be reversed.

[23] The general constitutional doctrine of the time was in accord. Only three years before the enactment of section 1305, the Court had decided *Whitney* v. *California,* 274 U.S. 357, which upheld a statute making unlawful the abstract advocacy of political and economic change.

IV

Finally, the Court must decide whether Section 1305 is unconstitutional on its face and as applied in this case for authorizing the prior restraint of nonobscene written advocacy without a warrant or an immediate subsequent judicial determination that the papers are not constitutionally protected. While this Court has allowed prior restraint of obscenity under strict procedural safeguards, *e.g., Freedman* v. *Maryland,* 380 U.S. 51, it has held that prior restraint of other expression is valid only if it threatens to bring about an extraordinary public danger and only if the threat is inevitable, direct and imminent. *See Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697; *New York Times Co.* v. *United States,* 403 U.S. 713. But no court has ever held that written advocacy of lawlessness creates a danger so great that it may be subjected to a prior restraint. Those cases which envision the possibility that writings may be subjected to prior restraint contemplate the publication not of advocacy of lawlessness, but of *true information* which will inevitably result in great public disaster, such as the revelation in time of war of the sailing dates of transports or the number and location of troops. *See Near* v. *Minnesota ex rel. Olson, supra,* 283 U.S. at 716.

Section 1305 contemplates that such advocacy, standing alone, will create a danger sufficient to justify the prior restraint. But that assumption is clearly incorrect as a matter of law. Indeed, one cannot reasonably imagine a writing which would meet the constitutional standard for subsequent punishment of speech, one so forceful and compelling as to be likely to produce imminent lawless action among its readers. *Compare, e.g., Hess* v. *Indiana,* 414 U.S. 105 (per curiam). Moreover, as a prior restraint, section 1305 precludes an accurate determination of the likely effect

written advocacy will have on its audience. In the absence of concrete evidence of the effect of the advocacy, the government is left with mere anticipation, speculation and conjecture about its inciting effects, and that is a constitutionally impermissible basis for limiting expression. *See Police Department* v. *Mosley,* 408 U.S. 92, 100-01; *Healy* v. *James,* 408 U.S. 169, 188-91; *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503, 508.

The constitutional infirmity of section 1305 is heightened by the fact that the decision whether or not to exercise a prior restraint on speech is made not by a judge or magistrate, but by a customs inspector. When expression is subjected to restraint for reasons other than its alleged obscenity, it must be preceded by a judicial examination of the material and an adversary determination that it is not constitutionally protected. See *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 564; *Roaden* v. *Kentucky,* 413 U.S. 496, 503-506; *Carroll* v. *Presidents & Commissioners of Princess Anne,* 393 U.S. 175, 183 and n. 10; *cf. Speiser* v. *Randall,* 357 U.S. 513. Even temporary restraint of nonobscene expression without judicial resolution of its constitutional status is invalid. *E.g., Organization for a Better Austin* v. *Keefe,* 402 U.S. 415.

Section 1305 contains no time limits for a judicial resolution. In *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 373-74, however, the Court construed the section "to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court." But *Thirty-Seven Photographs* dealt with seizure of allegedly obscene materials, and the First Amendment requires only prompt *post*-seizure judicial review of the status of such speech. *E.g., Freedman* v. *Maryland,* 380 U.S. 51. Seizure

of writings on grounds other than obscenity requires an advance adversary judicial hearing because, "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them," and "[a] delay of even a day or two may be of crucial importance in some instances." *Carroll* v. *Princess Anne, supra,* 393 U.S. at 182. Section 1305 may not be construed to require an advance judicial hearing and determination with respect to its advocacy prohibition because it explicitly contemplates only a post-seizure court proceeding. *See Blount* v. *Rizzi,* 400 U.S. 410, as explained in *United States* v. *Thirty-Seven Photographs, supra,* 402 U.S. at 369-70.

The court below rejected these contentions because the Church's papers "were detained for a very short period [10 days] by the Customs Service" and "this temporary delay and retention of documents do not constitute a constitutional deprivation" (App. A at 4a-5a). But as *Carroll* held, even a day or two delay may be critical in the receipt of information and ideas. Indeed, in the present case the detained papers were one-of-a-kind and critical to the Church's operations. Moreover, Section 1305 is facially invalid for failure to provide for an advance judicial determination of the constitutionality of advocacy, and not merely because the Church's own papers were detained for an unreasonable period.[24]

[24] As we have seen, the Church has standing to make this facial challenge because the search of its papers was based on Section 1305's advocacy prohibition, and if that provision is facially invalid, then the search was also illegal.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017
(212) 697-8640
Attorneys for Appellants

Of Counsel:

H. PETER YOUNG
MICHAEL L. HERTZBERG

January 26, 1979

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 76-2160-WPG

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
on its own behalf and on behalf of its members, et al.,

Plaintiffs,

v.

WILLIAM SIMON,
Secretary of the Treasury, et al.,

Defendants.

MEMORANDUM OF DECISION

Before:

BARNES, *Circuit Judge* and
GRAY and FERGUSON, *District Judges.*

GRAY, *District Judge:*

This three-judge court was convened to consider the constitutionality of 19 U.S.C. § 1305,[1] which prohibits the admission into the United States of several categories of documents and articles, including any writing or document that is obscene or contains:

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[1] A three-judge court was convened because the plaintiffs seek to restrain certain customs searches and seizures permitted by that statute. In all actions filed prior to August 12, 1976, that seek to enjoin enforcement of a statute, adjudication by a three-judge court is proper. 28 U.S.C. §§ 2281 *et seq.* The instant suit was filed on July 7, 1976.

". . . any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life or inflict bodily harm upon any person in the United States . . . ."

Under the authority of this statute, the United States Customs Service searches materials entering this country from abroad. The plaintiffs filed suit to enjoin the enforcement of this statute and to prohibit the customs officers from searching documents without obtaining a search warrant.

The relevant facts in the instant case are fairly straight forward. Four cartons of papers and documents were shipped from England, via international air cargo, to Church of Scientology employees in Los Angeles County. On July 3, 1976, the Customs Inspector on duty at Los Angeles International Airport opened the cartons, briefly scanned the documents, expressed uncertainty regarding the importability of the materials, and detained the cartons for further review of their contents.

Subsequently, special customs agents more carefully reviewed the documents and, on July 7, 1976, the District Directors of Customs concluded that the contents were importable. On that same day, the Church of Scientology filed suit for damages and injunctive relief and, on July 13, 1976, the cartons of documents were released to the plaintiffs.

A temporary restraining order issued in this case enjoined the Customs Service from copying or disseminating copies of any of the documents contained in the cartons. The Customs Service was permitted, however, to disclose the materials to the United States Attorney, who could

make one copy of documents he found appropriate for criminal evidentiary purposes or for defense of any damage claims that the plaintiffs might assert.

The plaintiffs raise several arguments in support of their claims for injunctive relief. First, they contend that Section 1305 is facially unconstitutional. Second, the plaintiffs urge that even if the statute is deemed constitutional, the method of enforcement in the instant case was improper. The plaintiffs take the position that a warrant was required initially to read the private, noncommercial documents shipped from abroad. Finally, the plaintiffs contend that once the Customs Service deemed the documents to be importable under Section 1305, its agents could not continue to read, detain, copy or disseminate copies of their documents without a warrant. We are unpersuaded by these arguments within the context of the facts of this case and we accordingly deny the request for an injunction.

Constitutionality of 19 U.S.C. § 1305

The Church of Scientology asserts that Section 1305 is overbroad, a prior restraint on speech, and void for vagueness. We disagree with these arguments, and hold that the statute is constitutional when properly construed and applied.

The plaintiffs insist that the statute is unconstitutionally overbroad, for it prohibits the importation of written materials that discuss violence as an abstract doctrine, as well as "action now" materials. It is obvious that the statute does not incorporate specifically the restrictions set forth in *Brandenberg* v. *Ohio,* 395 U.S. 444 (1969), which held that a state cannot proscribe advocacy of the use of force ". . . except where such advocacy is directed to incit-

ing or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 494. Nonetheless, we read such standards into Section 1305 in order to uphold its constitutionality. In doing so, we follow the example set by the Supreme Court in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) and in *United States* v. *12 200-Ft. Reels*, 413 U.S. 123 (1972).

In *Thirty-Seven Photographs*, the Supreme Court applied constitutional standards to uphold the statute's validity. The plaintiffs in that case had argued that Section 1305 was unconstitutional in that it failed to specify procedural time limits for judicial determination of obscenity as required by the First Amendment. Rather than invalidate the statute based on this lack of an express standard, the Court adhered to the ". . . cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 402 U.S. at 369. Similarly, in *12 200-Ft. Reels, supra*, the Court foreclosed an overbreadth attack, although the statute prohibited the importation of obscene materials both for private use and possession, as well as for commercial use.

In accordance with these decisions upholding the constitutionality of 19 U.S.C. § 1305, we interpret the "advocacy" section of that statute in a manner consistent with the Constitution. Thus, we will "read in" the standards set forth in *Brandenberg* v. *Ohio, supra*, and construe the statute to avoid the overbreadth attack.

We also reject the plaintiffs' argument that the statute permits an unconstitutional prior restraint of speech through the detention of imported materials. In this case, the Church of Scientology's papers, which consisted of many thousands of pages, were detained for a very short

period by the Customs Service, before the Service determined the papers to be importable. Under the Customs Service's broad powers to restrict imports and conduct a search of materials entering the country from abroad, this temporary delay and retention of documents do not constitute a constitutional deprivation.

Finally, the plaintiffs' argument that the statute is void for vagueness must also fail. This contention relates to the scope of discretion afforded the Secretary of the Treasury to admit books of recognized literary or scientific merit. The question of an improper exercise of this discretionary power is not presented by the facts of this case, and so we need not resolve it within this decision. Thus, we hold that the statute is constitutional as applied to advocacy issues, just as it previously has been held constitutional as applied to obscenity issues.

Enforcement of 19 U.S.C. § 1305

We also hold that the search pursuant to the statute was conducted in a constitutionally valid manner. The plaintiffs argue unsuccessfully that warrantless reading of materials entering the United States from abroad is suspect. We disagree with their contentions that a warrant was needed for the original inspection and that a warrant was required once the documents were deemed importable pursuant to § 1305.[2]

It is indisputable that the instant case involves a border search. The Customs Service has the statutory authority

[2] Complaints regarding allegedly unlawful operation or administration of a statute normally are not the proper subject of adjudication by a three-judge court under the standards set forth in 28 U.S.C. §§ 2281 *et seq.* However, in the interests of judicial economy, we may exercise our discretion to resolve pendent statutory claims, and we do so here. *See, Rosado* v. *Wyman*, 397 U.S. 397 (1970).

to examine materials coming into the United States, and the Supreme Court has enunciated clearly the position that the government possesses an inherent right to protect itself by stopping and examining persons and property entering the country from abroad. *United States* v. *Ramsey,* 431 U.S. 606 (1977).

In addition, the Constitution has given Congress broad, comprehensive powers to regulate commerce with foreign nations, and under this power "[i]mport restrictions and searches of persons or packages at the national borders" are justified by different "considerations and different rules of constitutional law from domestic regulations." *United States* v. *12 200-Ft. Reels,* 413 U.S. 123, 125 (1972).

Under its general powers in setting import restrictions, Congress may promulgate regulations regarding the importability of obscene material and material advocating the overthrow of the government. To enforce these regulations, the Customs Service has the right to search luggage and persons at our national borders. This search necessarily involves the examination or review of the materials in question, for the customs officers must scan or peruse and perhaps even read the materials to determine whether or not they are importable.

The Supreme Court recently reconsidered the standards and requirements for border searches in *United States* v. *Ramsey,* 431 U.S. 606 (1977). The Court reaffirmed the policy that border searches without probable cause and without a warrant are reasonable. In that case, the customs officials opened letter size envelopes arriving airmail from Thailand which they reasonably suspected contained illegally imported narcotics. The Court concluded that mail entering the country from overseas was not entitled to any

greater privacy than material coming from abroad by any other mode of entry.

In line with the reasoning set forth in *Ramsey,* the search involved here must be measured against the normal border search standards. The Court did leave open the question, however, of when a border search might be unreasonable and "particularly offensive." 431 U.S. at 618. However, it would be inappropriate and unnecessary for this court to determine what is reasonable under all circumstances, or what type of search would be unreasonable. It is sufficient that in this case the search was reasonable and complied with the more stringent border search test promulgated by the Ninth Circuit, in *United States* v. *Wilmot,* 563 F.2d 1298 (9th Cir. 1977). In that decision, the opinion cites *Ramsey* for the well-established principle that border searches "are reasonable simply by virtue of the fact that they occur at the border." It then stated that in order to justify an intrusive search, additional cause is necessary, and held that for a strip search "there must be 'real suspicion' directed specifically to the person searched." 563 F.2d at 1300.

The instant case withstands analysis under the Ninth Circuit's "real suspicion" test. The initial search, simply as a border search, was reasonable. It appears that the customs officer developed a "real suspicion" as to the importability of the contents of the cartons as a result of this initial search. We conclude that the customs officer's real suspicion concerning the importability of the documents fulfilled the additional cause requirement, and provided the basis for the more intrusive search that subsequently took place. Thus, the actions of the customs officers were proper and the enforcement of the border search was valid.

Finally, we reject the plaintiffs' argument that the gov-

ernment had to obtain a search warrant to continue searching, detaining and copying the documents. The plain view doctrine provides that an officer may seize evidence without a warrant if that officer has a proper justification for being coincidentally in a position to come upon the incriminating evidence. *Harris* v. *United States,* 390 U.S. 234 (1968).

The plaintiffs have neither argued nor presented any credible evidence in this case that the original inspection of the documents was conducted in bad faith or that the initial Section 1305 search was used as a guise for obtaining incriminating evidence for use against the Church of Scientology in other proceedings. Accordingly, we must conclude that the initial search was conducted in good faith and a proper inspection occurred.

The customs officers had a right to inspect the shipments and could seize any evidence of another crime, under the plain view doctrine, without first obtaining a search warrant. This conclusion regarding the permissible absence of a search warrant is buttressed by the Supreme Court's comment in *Ramsey, supra.* In *Ramsey,* the customs officials opened the airmail envelopes, discovered the heroin, resealed the envelopes and sent them to the Drug Enforcement Administration for further action. The Drug Enforcement Administration obtained search warrants after it received the envelopes. The Supreme Court treated the search warrants as an unnecessary and insignificant step, for the original opening and inspection of the envelopes had been legal. We hold, similarly, that a search warrant would be unnecessary, for the customs officers already were examining the documents in good faith and therefore the plain view doctrine is controlling.

For the foregoing reasons, the plaintiffs' application for a preliminary injunction will be denied and the action dismissed. This opinion shall constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

Dated: October 13, 1978.

/s/ WILLIAM P. GRAY
WILLIAM P. GRAY
United States District Judge

We concur.

/s/ STANLEY N. BARNES
STANLEY N. BARNES
United States Circuit Judge

/s/ WARREN J. FERGUSON
WARREN J. FERGUSON
United States District Judge

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 76-2160-WPG

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
on its own behalf and on behalf of its members, et al.,

Plaintiffs,

v.

WILLIAM SIMON,
Secretary of the Treasury, et al.,

Defendants.

For the reasons set forth in the Memorandum of Decision filed contemporaneously herewith,

IT IS ORDERED that the plaintiffs' petition for a preliminary injunction is denied and the action dismissed.

DATED: October 13, 1978

/s/ STANLEY N. BARNES
STANLEY N. BARNES,
Circuit Judge

/s/ WILLIAM P. GRAY
WILLIAM P. GRAY,
District Judge

/s/ WARREN J. FERGUSON
WARREN J. FERGUSON,
District Judge

APPENDIX C

Notice of Appeal

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 76-2160-WPG

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
on its own behalf and on behalf of its members,
DAVID W. JAMES, KENNETH WHITMAN,

Plaintiffs,

v.

WILLIAM SIMON,
Secretary of the Treasury, et al.,

Defendants.

NOTICE IS HEREBY GIVEN that the Church of Scientology of California, David W. James and Kenneth Whitman, the Plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order, entered in this case on October 13, 1978, denying their petition for a preliminary injunction and dismissing the action.

This Appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

LEONARD B. BOUDIN
H. PETER YOUNG
By: /s/
H. Peter Young
Attorneys for the Plaintiffs

LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013—966-4300

No. 78-1166

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS, DAVID W. JAMES, KENNETH WHITMAN, APPELLANTS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

WADE H. McCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
ELOISE E. DAVIES
Attorneys
Department of Justice
Washington, D.C. 20530

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THE CHURCH OF SCIENTOLOGY OF CALIFORNIA, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS, DAVID W. JAMES, KENNETH WHITMAN, APPELLANTS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

The Solicitor General, on behalf of appellees, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-9a) is reported at 460 F. Supp. 56.

JURISDICTION

The judgment of the district court was entered on October 13, 1978 (J.S. App. 10a). The notice of appeal was filed on November 8, 1978 (J.S. App. 11a). On December 27, 1978, Mr. Justice Rehnquist extended

the time for docketing the appeal to January 26, 1979. The jurisdictional statement was filed on January 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

QUESTION PRESENTED

Whether 19 U.S.C. 1305(a), which prohibits the importation of written or printed materials "containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States," is unconstitutional on its face or as enforced by the United States Customs Service in this case.

STATEMENT

1. On Saturday, July 3, 1976, at approximately 8:00 p.m., at Los Angeles International Airport, Customs Inspector Larry Hoyle was asked by a British Airways cargo agent to examine three cartons of air cargo from England shipped to appellant Church of Scientology for entry into the United States (Hoyle Aff. 1-2). The three cartons were opened for his inspection by Michael Moore, a member of the Church who went to the airport to claim the shipment (Compl. para. 34).

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[1]As appellants note (J.S. 2 n.2), this action was commenced on July 7, 1976, before the repeal of 28 U.S.C. 2282 and 2284 by the Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, which provided in Section 7 that the repeal "shall not apply to any action commenced on or before" August 12, 1976.

Appellants sought an injunction against the enforcement of 19 U.S.C. 1305(a), asserting that it is unconstitutional. Therefore a three-judge court was properly convened. It was also proper for the three-judge court, in its discretion under its pendent jurisdiction, to determine appellants' additional claims that the administrative action taken was illegal under the Fourth Amendment (see J.S. App. 5a n.2). See *Turner* v. *Fouche*, 396 U.S. 346, 353-354 n.10 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970).

Hoyle found that the cartons contained documents.[2] Briefly scanning a few of the documents, Hoyle saw references to the "CIA," "Interpol," "de-bugging," "decoding machine," "sabotage" and other similar matters,[3] which led him to believe that the materials might be prohibited from entry into the United States (Tr. 44, 46). Alarmed by the apparent nature of these documents, Inspector Hoyle informed Moore that the shipment would have to be held for a more thorough inspection during normal business hours on Tuesday, July 6, 1976, the next business day.

On Sunday morning, July 4, 1976, Inspector Hoyle was again on overtime duty when he was approached outside the cargo office by two persons who attempted to persuade him to release the shipment (Hoyle Aff. 3). Because of this attempt, Inspector Hoyle became concerned about the security of the shipment. He called Agent Michael Peel of the Customs Service to discuss it (*ibid.*; Peel Aff. 1). At approximately noon, Inspector Hoyle gave the cartons to Agent Peel, who transported them to the Customs Facility at Terminal Island, California, for safekeeping (Hoyle Aff. 3; Peel Aff. 1-2). Agent Peel then began a thorough screening of the contents. On the following day, while the screening was in process, Agent Peel learned that in the early hours of July 5, 1976, the British Airways Cargo Office had been burgled and a fourth carton

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[2]Approval of shipments for entry is not a regular function of a customs inspector on overtime duty, but because this was a holiday weekend and the consignee would otherwise have had to wait until normal business hours on Tuesday, July 6, 1976, for inspection of the shipment, Hoyle agreed to examine it (Hoyle Aff. 2).

[3]Hoyle also read in one document the phrase: "He doesn't have a criminal record because they don't know that he killed his wife" (Hoyle Aff. 2; Tr. 44, 46). "Tr." refers to the transcript of the hearing in the district court.

had been stolen (*id.* at 2). This fourth carton was later found on a British Airways loading dock, open, with some of its contents removed, and was delivered to Agent Peel during the morning of July 7, 1976, (*ibid.*). Agent Peel discussed his inspection of the contents of all four cartons with his superiors in the Regional Customs Office, and several customs officials examined some of the documents (Peel Aff. 2-3; Tr. 84). During the afternoon of July 7, 1976, the District Director of Customs concluded that the importation of the materials contained in the cartons was not prohibited by the customs laws (Tr. 29, 68, 96-98).

2. Appellants filed this action on July 7 seeking injunctive relief and damages.[4] The complaint alleged, among other things, that 19 U.S.C. 1305(a), under which the defendants acted, "is constitutionally void on its face" under the First Amendment because "it is not limited in scope to advocacy directed to inciting or producing imminent lawless action or violence and likely to produce such action or violence" (Compl. para. 35(b). It also alleged that Section 1305(a) is an impermissible prior restraint of expression (*ibid.*) and that the warrantless seizure of the boxes violated the Fourth Amendment (*id.* at paras. 19, 32).[5]

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[4]On February 18, 1977, all damages claims were dismissed by appellants.

[5]On July 8, 1976, the district court entered a temporary restraining order, which enjoined the Customs Service from copying or disseminating any of the materials in the four cartons but permitted the Service to disclose the materials to the United States Attorney and to make "one copy of certain of the materials" as he finds appropriate "for criminal evidentiary purposes and/or for defense of damage claims" asserted by appellants. On July 13, 1976, the Customs Service delivered the four cartons to the United States Attorney's Office (Peel Aff. 3; Tr. 11, 67, 72, 104).

3. On October 13, 1978, the three-judge district court rejected all constitutional challenges to 19 U.S.C. 1305(a). The court declined to construe the "advocacy" provision to prohibit the importation of written materials that merely advocate violence as a political doctrine. The court construed the "advocacy" portion of the statute to incorporate the standards of *Brandenburg* v. *Ohio*, 395 U.S. 444, 449 (1969), which held that a state cannot proscribe advocacy of the use of force or of law violation " 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action ' " (J.S. App. 3a-4a). The court further held that the Customs Service's retention of the documents until it determined that they were importable did not constitute an "unconstitutional prior restraint of speech," because the thousands of pages of documents involved were detained for a "very short period" (*id.* at 4a-5a). Finally, the court held that the customs agents' warrantless reading of the documents was within the Customs Service's statutory authority to conduct "border searches" of materials coming into the United States from abroad (*id.* at 6a-7a). The court concluded that Inspector Hoyle's initial inspection was reasonable simply because the materials arrived from abroad, and that Hoyle's "reasonable suspicion" about the importability of the contents of the cartons provided the basis for the later more thorough inspection. The court determined that the actions of the customs officers were proper and in good faith, and that the detention of some documents as possible evidence of crimes other than customs violations was permissible under the "plain view doctrine" (*id.* at 7a-8a).

ARGUMENT

The decision of the district court is correct, and no substantial question is presented by the appeal.

1. Appellants contend that the warrantless search by customs officials violated the Fourth Amendment. The search, however, was a border search. It is essential for the effective enforcement of federal customs laws that customs officers be permitted to open cartons coming from abroad—without probable cause and without warrants—in order to determine whether their contents are lawfully imported. The reasonableness of such searches under the Fourth Amendment has long been recognized. As the Court observed in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971), "[c]ustoms officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country." In *United States* v. *Ramsey*, 431 U.S. 606, 618-620 (1977), the Court held that luggage and envelopes—whether arriving on the person of entrants or as cargo or mail—may be inspected at the border.[6] See also *United States* v. *12 200-Foot Reels of Film*, 413 U.S. 123, 125 (1973).

The cartons in this case were properly opened at the border. The initial inspection of the contents occurred during a routine examination, when appellants' representative opened the cargo for examination during the process of receiving the cargo. The materials were detained for further examination only after Inspector

[6]In *Ramsey* the Court held (431 U.S. at 619):

> Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

Hoyle formed a genuine suspicion that importation of the materials might violate Section 1305(a).[7] Three days later, despite an intervening holiday, customs officials concluded that the documents were lawfully imported. This was a reasonable border search.

Appellants argue that *Ramsey* sustained the border search in that case only because the customs officials did not read the contents of the envelopes searched.[8] Appellants conclude that the search in the present case was invalid because the agents did read the contents of the carton. It is true that in discussing certain First Amendment claims in *Ramsey* the Court noted that a regulation prohibited customs officials from reading international mail without a warrant (see 19 C.F.R. 145.3). But those regulations do not pertain to cartons, and the Court did not base its Fourth Amendment holding that a valid border search had occurred on the existence of the regulations. To the contrary, the Court stated that "[t]he critical fact is that the envelopes cross[ed] the border and enter[ed] this country * * *. It is their entry into this country * * * that makes a resulting search 'reasonable'." 431 U.S. at 620. That the cartons of air cargo involved in this case crossed the border was by itself enough to subject them to the limited detention and examination that occurred in this case. And whatever special rules may apply to inspections of envelopes do not apply to inspections of cartons.[9]

[7]Although appellants contend that the Customs officials engaged in a "general law enforcement search" (J.S. 18-19), appellants concede that customs officials conducted the search for violations at 19 U.S.C. 1305 (J.S. 19). In any event, the district court found that the initial search was not a pretext for obtaining evidence against the Church of Scientology in other proceedings (J.S. App. 8a).

[8]The envelopes in *Ramsey* contained heroin but no writings.

[9]The principal dispute in *Ramsey* was whether the traditional rules, which unquestionably had allowed thorough searches of

2. Appellants contended below that Section 1305(a) violates the First Amendment because it seems to prohibit importation of written materials that merely advocate the overthrow of the government and thus violated the holding of *Brandenburg* v. *Ohio*, 395 U.S. 444, 494 (1969), that a state cannot proscribe advocacy of the use of force "except where such advocacy is directed to incit[ement] or producing imminent lawless action and is likely to incite or produce such action." The district court avoided the constitutional issue by construing Section 1305(a) to proscribe only those materials that constitutionally may be proscribed under the *Brandenburg* test.

Appellants now contend that the district court erred in adopting a construction that gave them the very result they wanted—a rule under which documents

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packages ariving from abroad, also allowed searches of envelopes sent as letter-class mail. It was common ground among the parties and the Justices that cartons, luggage and the like could be opened without cause. Respondents in *Ramsey* simply argued that envelopes should be treated differently because they were especially likely to contain correspondence. The Court rejected that argument, and the argument of appellants here must fail as a result.

Appellants rely on 19 U.S.C. 482, which gives Customs officials authority to open any "trunk or envelope" that they have "reasonable cause to suspect" contains dutiable articles or contraband, as a limit on the power of officials to open cartons at the border (J.S. 16). The statute cannot be so employed, for several reasons. First, the Court interpreted that "reasonable cause" language in *Ramsey* as meaning only that Customs officials must have cause to suspect that an envelope contains something other than correspondence. In the present case it was clear that the cartons had more than routine personal correspondence. Second, nothing in Section 482 purports to restrict authority given by other statutes. The opening here was authorized by 19 U.S.C. 1582, which authorizes the Secretary of the Treasury to "prescribe regulations for the search of persons and baggage * * * coming into the United States from foreign countries * * *." Section 1582 does not condition the right to search on the presence of particularized suspicion.

advocating violence may be imported. It is hard to understand the cause of their complaint; they were not aggrieved. The district court followed the course charted by the Court for Section 1305(a) in *Thirty-Seven Photographs*. In that case Section 1305(a), as applied to the importation of allegedly obscene materials, was challenged for failure to comply with the prompt-hearing requirements of *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The Court avoided the constitutional issue by construing Section 1305(a) to incorporate the prompt-hearing requirements, which the Court observed were not inconsistent with the purpose of Section 1305(a). The Court also observed that 19 U.S.C. 1652 provided that "[i]f any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby." This provision is a direction to the courts not to invalidate Section 1305(a) if some narrow, saving construction could be drawn.

In the present case, the construction of Section 1305(a) adopted by the district court is not inconsistent with the purpose of the statute.[10] Because the district

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[10]Appellants contend that Section 1305(a), as amended by the Tariff Act of 1930, cannot logically be read to incorporate the *Brandenburg* standards because its language is modeled on an earlier postal statute (now codified as 18 U.S.C. 1717) that was intended by Congress, and has been construed by the Court and the Second Circuit, to "embrace abstract advocacy" (J.S. 21-22). They claim that *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921), and *Masses Publishing Co.* v. *Patten*, 246 F. 24 (2d Cir. 1917), upheld the Postmaster General's action under the *postal* statute barring from the mails written material "merely criticizing laws and government policy, on the ground that such criticism *impliedly* advocated civil disobedience" (J.S. 22). Therefore, appellants reason, Section 1305(a) cannot be construed as the district court did. But this argument overlooks the critical fact that the postal statute was a

court's construction does not conflict with any other judicial construction of Section 1305(a) (see J.S. 20), and because the construction is generally favorable to appellants, they have no grievance that calls for reversal.[11]

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part of the Espionage Acts of 1917 (40 Stat. 217) and was construed accordingly. The Postmaster's barring of certain publications from the mails in *Burleson* was sustained by this Court on the ground that the publications conveyed "false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willfull attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law" (255 U.S. at 414). Similarly, in *Masses* the Second Circuit construed the statute as a constitutionally permissible measure intended to close the United States mails to letters or literature in furtherance of acts prohibited elsewhere in the Espionage Acts (246 F. 2d at 27). These decisions rest on the principle enunciated in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919):

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

See also *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). The customs statutes do not share this foundation and are not principally designed to guard against treason or to preserve morale in time of war. The purposes and history of Section 1305(a) thus do not unequivocally forbid the district court's construction.

[11]It is open to question, however, whether constitutional principles required the district court to construe the statute as it did. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), establishes that Congress or the Executive Branch can prohibit the "import" of persons bearing unwelcome ideas, even though the ideas themselves would be entitled to constitutional protection within the United States. Similarly, it may be that Congress can require written materials to be turned away at the border, even if possession of those materials within the United States could not constitutionally be made a crime. If the Court were to set this case for plenary review, appellees could assert this argument in support of the district court's judgment. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

3. Appellants argue that Section 1305(a) offends the First Amendment because it authorizes a prior restraint on written communications received from overseas. We assume for purposes of argument that the First Amendment prohibits an unduly long seizure of written communications of the type sent to appellants and that, in a proper case, the Court might impose time limitations on the advocacy provisions of Section 1305(a) similar to the time limitations imposed on the obscenity provisions of Section 1305(a) in *Thirty-Seven Photographs*. Nonetheless, that issue is not presented by this case.

Appellants' voluminous documents arrived on the evening of July 3, 1976. Despite the intervening holiday the documents were examined promptly, and by July 7 the Customs Service had determined that the cartons could be lawfully imported. Such a "very short delay," as the district court observed (J.S. App. 4a-5a), is well within the 14-day and the 60-day time limits imposed by *Freedman* and *Thirty-Seven Photographs*. The issue appellants would like to present should be decided only if Customs officials ever use Section 1305(a) to refuse importation of "mere advocacy" materials or undue delay in making a determination that such materials are importable. In such concrete circumstances, the competing considerations concerning the wisdom of time limits and the respective roles of administrative and judicial determinations would be much better illuminated than in the abstract circumstances of this case.[12]

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[12]Appellants cite *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), for the proposition that "a day or two" can be critical where speech is concerned. We agree that in the context of that case—where an *ex parte* court order banned a political rally scheduled for the next day—a day or two was critical. Here, however, appellants do not suggest that a day or two delay in receiving their overseas air cargo threatened any

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
ELOISE E. DAVIES
Attorneys

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political rally or equivalent speech interest. In fact, as we observed (see note 2, *supra*), appellants normally would not have received their cargo until July 6, 1976, given its arrival on the evening of July 3. Inspector Hoyle was not required to examine the cartons on July 3; he did so only as an accomodation to appellants.

DOJ-1979-04

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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on its own behalf and on behalf of its members,
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KENNETH WHITMAN,

Appellants,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANTS' REPLY MEMORANDUM

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017
Attorneys for Appellants

Of Counsel:

H. PETER YOUNG
1725 The Promenade, No. 516
Santa Monica, California 90401

MICHAEL L. HERTZBERG
275 Madison Avenue
New York, New York 10016

April, 1979

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1. The government does not deny that customs inspectors opened not only the air freight cartons but also the sealed envelopes contained inside, and that they proceeded to read private correspondence and documents without possessing even a scintilla of evidence that importation of the documents would violate United States customs or other law. It attempts to obfuscate the substantial constitutional and statutory issues raised by its conduct, however, by suggesting that the search in this case was an ordinary border search of "cartons" for contraband. Thus, for example, the government quotes language from *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, uphold-

ing the right of customs officers to "inspect luggage" to exclude "illegal articles" from the country (Gov. Motion at 6).[1]

The present case does not involve the inspection of luggage or cartons, *per se*. While it undoubtedly was unlawful for the customs agents even to open the cartons without reasonable suspicion of a customs violation, see 19 U.S.C. § 482, the critical issue in the case is that the agents also opened the envelopes and read the letters and other documents. No case in the history of the United States has upheld such conduct in the absence of reasonable cause or suspicion to believe that importation would be unlawful.

The government's reliance on *United States* v. *Ramsey*, 431 U.S. 606, is astonishing. While *Ramsey* upheld the opening of envelopes at the border, it did so upon two caveats: (1) There was reasonable cause to suspect that the envelopes contained contraband; and (2) The search did not involve the reading of correspondence, which was not contained in the envelopes and the reading of which without a warrant in any event would have been barred by regulation. The government's flip assertion here that "those regulations do not pertain to cartons" (Gov. Motion at 7) hardly disposes of the *Ramsey* Court's obvious concern that the reading of correspondence without cause or a warrant would present critical questions under the First and Fourth Amendments. See 431 U.S. at 614, n.8, 623-24. In the instant case, appellants have not argued that a warrant was necessary before the *cartons* could be opened. The mere fact that the Church's air cargo crossed the border, however, could not justify the seizure and wholesale reading of First Amendment materials. The significance of the instant case lies in the fact that the *writings* contained within the Church's packages were searched and seized, not only absent a warrant, but also without even reasonable cause to suspect that they were materials whose importation was prohibited.

[1] References to "Gov. Motion" are to pages in the government's Motion to Affirm. References to "J.S." are to the Jurisdictional Statement.

The government cannot argue to the contrary that the correspondence was detained for further examination only after Inspector Hoyle "formed a genuine suspicion that importation might violate § 1305(a)" (Gov. Motion at 7). By that time, the unreasonable initial search of the appellants' correspondence already had occurred. It is significant that Inspector Hoyle never claimed that his reading and detention of the private correspondence was based upon a suspected violation of § 1305(a), or any other statute or regulation (J.S. at 6, 17).[2]

The government makes one final argument in attempting to justify the opening of the cartons by inexplicably stating that 19 U.S.C. § 1582 authorizes the Secretary of the Treasury to "prescribe regulations for the search of persons and baggage . . . coming into the United States from foreign countries . . . ." (Gov. Motion at 8, n.9). The section quoted by the government is merely an enabling statute. The statute does not authorize a regulation allowing the warrantless reading of correspondence or other written documents, with or without cause or suspicion. The government fails to cite a particular regulation relevant to the instant case. The appellants are aware of no such regula-

[2] The government claims that the appellants "concede that customs officials conducted the search for violations at [sic] 19 U.S.C. 1305" (Gov. Motion at 7, n. 7). The appellants have made no such concession with respect to Inspector Hoyle's initial reading of the documents. The government perhaps is referring to the testimony of Customs Agent Peel, quoted by the appellants, that *he* conducted the subsequent more comprehensive search of the appellants' correspondence in an effort to detect violations of § 1305 and "for other violations of the law" (J.S. at 7).

tion. Even if one were promulgated, it would not be constitutional, unless consistent with First and Fourth Amendment requirements.

2. The government has made no response to appellants' argument that the exhaustive search of their correspondence for evidence of "any crime" over a four day period by customs agents working with several Assistant United States Attorneys was a general law enforcement search rather than a border search (J.S. at 18-20). Instead the government attempts to merge the initial search by Inspector Hoyle with the subsequent more comprehensive seizure and search (Gov. Motion at 6-7). The second search simply cannot be analyzed under border search principles (J.S. at 18-20).

3. The government argues that appellants were not aggrieved by the district court's decision applying a limiting construction to 19 U.S.C. § 1305 because that construction applied the First Amendment principles urged by appellants (Gov. Motion at 8-10). The simple answer is that the appellants were aggrieved by the search and seizure of their correspondence and documents, which the government itself seeks to justify as having been authorized under section 1305. Appellants have shown that the statute is unconstitutional on its face, that it is not susceptible of a limiting construction, and that the seizure and search of appellants' correspondence therefore was without legal basis (J.S. at 20-23). Moreover, the customs agents who carried out the search and seizure of the documents did not apply the limiting construction to the statute adopted by the district court after the fact. Rather, Agent Hoyle understood § 1305's prohibition to embrace mere advocacy and acted accordingly. He testified below that it was his duty to forbid importation of "anything . . . indicating overthrow of the government or actual sabotage", and that "if it were a treasonist [*sic*] type of book advocating overthrow of the government, then it would be a violation of law and not subject to entry" (Transcript, 44-45). Thus the district court's limiting construction came too late to protect appellants' constitutional rights.

On the merits of the issue, the government argues that *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, and 19 U.S.C. § 1652 support the district court's limiting construction because they provide a "direction to the courts not to invalidate section 1305(a) if some narrow saving construction can be drawn" (Gov. Motion at 9). But nothing in either *Thirty-Seven Photographs* or section 1652[3] authorizes the Court to construe section 1305 contrary to the intent of Congress. In *Thirty-Seven Photographs*, this Court did no more than read into section 1305(a) the time limits for obscenity determinations mandated by *Freedman* v. *Maryland*, 380 U.S. 51. In doing so, the Court carefully examined the relevant legislative history of section 1305(a), and concluded that its interpolation of the *Freedman* requirements was "fully consistent with [the statute's] legislative position." *Id.* at 370. The Court, citing *Blount* v. *Rizzi*, 400 U.S. 410, and *Freedman* v. *Maryland*, *supra*, also stressed that it will *not* strain to save the constitutionality of a statute by reading into it a purpose at odds with its legislative intent. 402 U.S. at 369.

The present case is governed by *Blount* rather than *Thirty-Seven Photographs*. See also *United States* v. *Reese*, 92 U.S. 216, 221; *Aptheker* v. *Secretary of State*,

[3] Section 1652 provides:

> If any provision of this chapter, or the application thereof to any person or circumstances is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby.

378 U.S. 500, 515; *Marchetti* v. *United States,* 390 U.S. 38, 58-60. In enacting section 1305's advocacy provision, Congress intended to proscribe mere abstract advocacy; therefore, the district court erred in incorporating the *Brandenburg* standard into the statute (J.S. at 21-23). Specifically, the 1930 Congress which enacted section 1305 modelled it upon the Espionage Act of 1917's postal prohibition of abstract advocacy, the broad application of which had been upheld in *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U.S. 407, and *Masses* v. *Patten,* 246 F.24 (2d Cir. 1917). Congress fully intended section 1305 to reach the same written advocacy materials prohibited by the Postmaster General under the Espionage Act. See H.R. Rep. No. 7, 71st Cong. 1st Sess., at 160 (1930); 82 Congressional Record 5487-5520 (Senate debates, 1930).

In response, the government suggests that because section 1305 did not share the postal prohibition's "foundation" in the Espionage Act of 1917, and was "not principally designed to guard against treason or to preserve morale in time of war," it was not intended to have the same sweeping reach as the postal prohibition (Gov. Motion at 9-10, n. 10). The government similarly distinguishes the *Burleson* and *Masses* cases as "war-time" cases, arguing that their application of the postal prohibition to prohibit the mailing of "abstract advocacy" written materials did not necessarily inform Congress' intent in enacting section 1305. Thus, the government concludes that section 1305's "purposes and history do not unequivocally forbid the district court's construction" (*Id.*).

Burleson and *Masses* were, indeed, "war-time" cases, but their failure to distinguish between abstract advocacy and incitement or to require a likelihood of imminent danger did not rest on peculiarly war-time considerations. *See* Z. Chafee, *Free Speech in the United States,* 48-50, 299, 304 (1941). The postal law, today codified as 18 U.S.C. § 1717, continued in existence after World War I, and in 1930, the very year in which section 1305's advocacy provision was enacted, it was still construed, as in *Masses* and *Burleson,* to prohibit mere advocacy. *See Gitlow* v. *Kiely,* 44 F.2d 227 (S.D.N.Y. 1930).

Furthermore, the governing First Amendment law in 1930 had been established in *Gitlow* v. *New York,* 268 U.S. 652, and *Whitney* v. *California,* 276 U.S. 357, both peacetime cases which held that mere advocacy of lawless action constitutionally could be prohibited because of the "bad tendencies" of such expression. While *Gitlow* and *Whitney* later were "thoroughly discredited," *Brandenburg* v. *Ohio,* 395 U.S. at 447, they remained good law until at least the 1937 decision in *Herndon* v. *Lowry,* 301 U.S. 242. *See* Z. Chafee, *supra,* at 318-25, 343-53, 388-98; *Dennis* v. *United States,* 341 U.S. 496, 505-507 & n. 5; *Brandenburg* v. *Ohio, supra,* 395 U.S. 447-48.

Accordingly, the Congress which enacted the sweeping prohibitory language of section 1305 did so with the knowledge that the Court had upheld similar restraints upon pure expression against First Amendment challenge. It is inconceivable that the 1930 Congress intended that the language of the statute be restricted in accordance with a First Amendment standard that had not yet been developed, and which did not reach final articulation until the *Brandenburg* decision thirty-nine years later.[4]

[4] By contrast, the Congress of 1941 which enacted the Smith Act "was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action . . . and did not intend to disregard it," for, by then, *Gitlow* and *Whitney* already had been undermined. Thus the Smith Act could be construed to incorporate that distinction. *See Yates* v. *United States,* 354 U.S. 298, 319; *Dennis* v. *United States, supra,* 341 U.S. at 502.

The district court, in thus creating a statute very different from the one Congress intended, necessarily made policy determinations which properly belong in the legislative sphere. Were determination of the issue left to Congress, it might well reach an entirely different resolution than that embodied in the district court's construction of section 1305(a). For example, today's Congress might well conclude that the chances that dissemination of written advocacy ever would produce *Brandenburg's* constitutionally required likelihood of imminent lawlessness are *de minimus, cf. Cox* v. *Louisiana,* 379 U.S. 559, 566, and not worth either the financial costs necessary to enforce a proper restriction or the risks to protected expression inherent in any scheme of administrative prior restraint, even one meeting *Brandenburg's* standards. Judicial reconstruction of section 1305(a)'s advocacy proscription to meet *Brandenburg's* standards displaces the congressional role, while a holding that the statute is invalid on its face would put the task squarely before Congress, where it belongs.

Since "[t]he task of writing legislation which will stay within [the First Amendment's] bounds has been committed to Congress," *United States* v. *Robel,* 389 U.S. 258, 267, it should be permitted "to decide whether and in what form the statute should be rewritten." *See* Comment, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel,* 57 Calif. L. Rev. 240, 256 (1969). Section 1305(a)'s advocacy provision must be ruled unconstitutional on its face, as was the state statute in *Brandenburg. See, e.g., Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441.

Finally, the government suggests that the district court's limiting construction might not be necessary to save section 1305 from constitutional attack (Gov. Motion at 10,

n.11). Purporting to rely on *Kleindienst* v. *Mandel,* 408 U.S. 753, the government asserts that "it may be that Congress can require written materials to be turned away at the border, even if possession of those materials within the United States could not constitutionally be made a crime" (*Id.*). The government then reserves the right to raise the point should probable jurisdiction be noted.

It is inconceivable that the government in fact would argue such a proposition to this Court. *Kleindienst* v. *Mandel, supra,* the very case on which it purports to rely, explicitly reaffirmed the principle that the government may not prevent its citizens from receiving written materials advocating political, social or revolutionary doctrine or ideas, even from abroad. 408 U.S. at 762-65; *accord, Lamont* v. *Postmaster General,* 381 U.S. 301. Indeed in *Kleindienst* the government acknowledged the right of United States residents to receive Mandel's ideas through books, pamphlets, tapes and even telephone hook-ups, in arguing that therefore there was no compelling necessity that Mandel be permitted physical entry into the country. 408 U.S. at 765. Thus section 1305 cannot be upheld without the limiting construction to which it is not susceptible. It therefore is unconstitutional.

4. The government asserts that this case does not properly present the issue of whether section 1305(a) is invalid as a prior restraint because the Church's papers were detained for a "short" period[5] without seizure or forfeiture (Gov. Motion at 11).[6] But the Church properly raises its

[5] The government misleads the Court when it states that appellants' correspondence was only delayed "a day or two" (Gov. Motion at 11, n. 12). In fact, the record shows the government did not commence returning the seized correspondence until at least six days had elapsed (J.S. at 6-9).

[6] The government addresses only one of the prior restraint contentions appellants make: That section 1305(a) is facially invalid

facial challenge to section 1305(a)'s prior restraint of advocacy in this case for two reasons. First, the Church's papers were read solely for the purpose of determining whether they should be seized and forfeited under section 1305(a)'s proscription of advocacy; if that statutory predicate for the search is facially invalid, the search itself lacks legal justification. (*See* J.S. 20-21 n. 20, 26 n. 24 & cases there cited.) Second, the Church, alleging without contradiction that it regularly imports papers from abroad, sought prospective relief against enforcement of the statute to preclude the concrete and objective threat that customs agents would read, detain and seize its papers without a prior warrant and without a prior adversary judicial hearing. *See, e.g., Steffel* v. *Thompson,* 415 U.S. 452, 459; *Dombrowski* v. *Pfister,* 380 U.S. 479.

The government also contends (Gov. Motion at 11) that in a case properly presenting the issue, the Court might impose the time limits for forfeiture proceedings read into section 1305(a) with respect to alleged obscenity by *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363. The government ignores the fact that where restraint of expression is sought on grounds that it allegedly advocates lawlessness, time is much more critical than in the case of obscenity and the First Amendment thus requires an adversary judicial inquiry in *advance* of any substantial detention of more than a day. *See Carroll* v. *President & Comm'ners of Princess Anne,* 393 U.S. 175, 183 & n. 10. Because it contemplates only mechanisms for post-seizure judicial review, section 1305(a)'s proscription of advocacy may not be judicially rewritten to require such an advance inquiry but must be ruled invalid on its face. *See Blount* v. *Rizzi,* 400 U.S. 410, *as explained in United States* v. *Thirty-Seven Photographs, supra,* 402 U.S. at 369-70.[7]

because it authorizes substantial restraint through detention and seizure of written advocacy of lawlessness without an advance adversary judicial determination of whether it is constitutionally protected or not. *See, e.g., Carroll* v. *President & Comm'ners of Princess Anne,* 393 U.S. 175, 183 & n. 10; *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415. It fails to respond to two other strands of the prior restraint argument: (1) That § 1305(a) is invalid on its face because it authorizes substantial restraint through detention and seizure of written advocacy without an advance judicial *warrant. See, e.g., Zurcher* v. *Stanford Daily,* 437 U.S. 547, 564; *Roaden* v. *Kentucky,* 413 U.S. 494, 503-06; and (2) That the statute is facially void because it sanctions a restraint of written advocacy of lawlessness in advance of its dissemination, when determination of its danger, *i.e.* its inciting effect, rests on mere conjecture and speculation, an insufficient basis for a prior restraint. *See, e.g., Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 563, 565, 568-69; *New York Times Co.* v. *United States,* 403 U.S. 713.

[7] Contrary to the government's claim, such a resolution need not await a case in which customs officers actually refuse importation of advocacy or unduly delay their determination of its importability, nor does the Church have to show that a short delay threatens its speech interests. Judicial appraisal of the relevant competing considerations is made on the face of the statute, as *Blount* and *Thirty Seven Photographs* show. The Church need show nothing more than that the restraint is sought on grounds that its papers contain advocacy of lawlessness to invoke *Carroll's* advance hearing requirement, and that was undisputed below. In any event, the Church made uncontradicted and sworn allegations below that even the shortest of restraints interfered with its expressive interests, disrupting the free flow of communications between its branches and hence interfering with effective Church operations.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

LEONARD B. BOUDIN
ERIC M. LIEBERMAN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
30 East 42nd Street
New York, New York 10017
(212) 697-8640
Attorneys for Appellants

Of Counsel:

H. PETER YOUNG
MICHAEL L. HERTZBERG

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